

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

Randy S. Delano,

Defendant-Petitioner.

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CASE NO. 1:07-CR-00566-001

OPINION & ORDER
[Resolving Doc. No. [129](#)]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Defendant-Petitioner Randy S. Delano moves *pro se* to amend and supplement his § 2255 motion with an actual innocence claim and an argument that he is entitled to the benefit of “the new retroactive crack law amendment.” [[Doc. 129](#).] Because he fails to present any new evidence, and the Fair Sentencing Act of 2010 is not retroactive, the Court **DENIES** his motion.

I. Background

Following a jury trial, Defendant-Petitioner Randy S. Delano was convicted of possession with intent to distribute cocaine and crack cocaine. [[Doc. 89](#).] On July 21, 2011, the Defendant-Petitioner filed a *pro se* motion to vacate, set aside, or correct his sentence pursuant to [28 U.S.C. § 2255](#), saying that there was insufficient evidence to support his conviction. In support of the motion, Delano says a witness called by the government, Loreal Johnson, admitted that the drugs in question were hers, and that his attorney was ineffective for failing to file a direct appeal. [[Doc. 118](#).]

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The Defendant-Petitioner now seeks to amend his motion in two ways. First, he says that his motion should have included a claim of actual innocence, and that if he is permitted to introduce a tape recording of Loreal Johnson's post-arrest statement, the tape recording "would support [his] claim of actual innocence." [[Doc. 129 at 3-4.](#)] Second, he says that if any relief "under the new crack amendment law is applicable it should be applied." [Id. at 4.](#)

II. Analysis

A district court properly denies a motion to supplement a § 2255 motion where the proposed argument makes claims based on inapplicable authority, [McCall v. United States, No. 99-3524, 2000 WL 1597853 \(6th Cir. 2000\)](#), where an issue is not "properly raised" because the legal argument has been specifically rejected, [id. at *1](#), or where cited authority "is not applicable." [Id. at *3](#). "Motions to amend 'should be denied if the amendment . . . would be futile.'" [United States v. Gibson, 424 F. App'x 461, 465 \(6th Cir. 2011\)](#) (quoting [Colvin v. Caruso, 605 F.3d 282, 294 \(6th Cir. 2010\)](#)).

The Defendant-Petitioner's Motion suffers both deficiencies and the proposed amendments would be futile. First, the Loreal Johnson tapes (there are two^{1/}) are not newly discovered evidence and cannot establish actual innocence. [Schlup v. Delo, 513 U.S. 298, 327-28 \(1995\)](#) (explaining that "new evidence" required to establish actual innocence refers to "relevant evidence that was either excluded or unavailable at trial.>"). It is undisputed that tapes were neither excluded nor unavailable at trial. They were provided to the defense in discovery, [[Doc. 130 at 3](#)], and defense counsel chose

^{1/}The first recorded post-arrest interview provides an account of the events leading up to the arrest of Loreal Johnson, who was at a graduation party with the Defendant-Petitioner. They left the party in the Defendant-Petitioner's car, and when a patrol car approached, he threw a package containing drugs into her lap and told her to put it down the front of her pants." [[Doc. 126 at 3.](#)] In the second recorded interview, Loreal Johnson stated that the drugs belonged to the Defendant-Petitioner. [Id.](#) The Defendant-Petitioner does not dispute either characterization of the tapes, saying only that the tape recordings "could have proved my innocence." [[Doc. 118 at 4.](#)]

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not introduce them despite the Defendant-Petitioner's request. [[Doc. 118 at 4.](#)] This may be because, as the government says, the tapes are in fact inculpatory, [[Doc. 130 at 3](#)], but they cannot make it "more likely than not that no reasonable juror" could have convicted the Defendant-Petitioner, [Schlup, 513 U.S. at 327](#), because Loreal Johnson testified on cross-examination that the drugs were hers, not his, [[Doc. 91 at 60](#)] and the jury nonetheless chose not to credit that testimony in reaching its verdicts. [[Doc. 118 at 4.](#)] A reasonable juror could have credited instead the testimony of Loreal Johnson that they were on the Defendant-Petitioner's lap before he threw them on hers and told her to "stick them down [her] pants," [[Doc. 91 at 24-25](#)], and the testimony of Special Agent Robert McBride that the Defendant-Petitioner admitted that the drugs were his. [[Doc. 109 at 79, 91.](#)]

Second, the Defendant-Petitioner's request to benefit from any applicable provisions of "the new crack amendment law," by which the Court understands him to mean the [Fair Sentencing Act of 2010, Pub. L. 111-220, 124 Stat. 2372 \(Aug. 3, 2010\)](#), is futile. The Defendant-Petitioner was sentenced well before enactment on June 17, 2008, [[Doc. 88](#)], and the Act's amendments to [21 U.S.C. § 841](#) are not retroactive. [United States v. Carradine, 621 F.3d 575, 580 \(6th Cir. 2010\)](#).

III. Conclusion

For the foregoing reasons, the Court **DENIES** the Defendant-Petitioner's motion.

IT IS SO ORDERED.

Dated: November 3, 2011

s/ James S. Gwin
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE